STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SBC COMMUNICATIONS INC.,	)	
SBC DELAWARE INC.,	)	
AMERITECH CORPORATION,	)	
ILLINOIS BELL TELEPHONE COMPANY	)	
d/b/a AMERITECH ILLINOIS, and	)	
AMERITECH ILLINOIS METRO, INC.	)	
	)	98-0555
	)	
Joint Application for approval of the	)	
reorganization of Illinois Bell Telephone	)	
Company d/b/a Ameritech Illinois, and the	)	
reorganization of Ameritech Illinois Metro, Inc.	)	
in accordance with Section 7-204 of The Public	)	
Utilities Act and for all other appropriate relief.	)	

POST-HEARING BRIEF OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), on behalf of its members, hereby submits its post-hearing brief regarding the proposed merger between SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech") (collectively the "companies"). TRA specifically addresses the additional testimony and evidence submitted by parties on re-opening in urging adoption of stiff incident-based, self-effectuating non-performance penalties on the companies, if the merger is ultimately approved.

I. INTRODUCTION

Throughout this proceeding, SBC and Ameritech have positioned their proposed merger *inter alia* as a necessity to compete in a global marketplace. The companies have stressed that the proposed merger will result not only in an enhanced ability to compete, but also in an enhanced ability to deliver improved services and thus provide broad benefits to the public. Nevertheless, SBC's and Ameritech's rhetoric remains founded on speculative promises.[1]

The prospect of two mammoth global enterprises creating an even larger, more powerful organization sends chills through smaller companies, such as TRA members, who in some instances are striving to merely survive in local and interexchange markets, let alone compete against titans such as SBC and Ameritech. As AT&T witness Gillan aptly notes, "[s]imple logic says that the combination of two monopolies is a stronger monopoly [original footnote omitted]."[2] Yet it is not the new entity's size alone which raises such concerns,[3] but the ability of the new entity to leverage its seemingly limitless resources to compete *at a time when neither SBC nor Ameritech have effectively opened up their local markets to competition*.[4] Smaller companies' prospects are dim if the new merged entity's enhanced ability to compete translates into an enhanced ability to crush competitors. It is the competitors' legitimate concerns of anticompetitive activity designed to retain a virtual monopoly local market share that necessitates the Commission's careful evaluation of the proposed merger and the conditions under which the merger may be approved.

The record is replete with the concerns raised by Ameritech's and SBC's

[1] AT&T Witness Gillan characterizes these promises as "rainbow conditions" whose appeal diminishes upon closer scrutiny. Gillan Direct Testimony on Reopening (AT&T Ex. 1.2) ["Gillan Direct"] at 4

[2] Gillan Direct at 3.

[3] "The new SBC will control nearly 75% of the nation's business market" (Gillan at 6). Mr. Gillan notes that SBC's closest local competitor is MCIWorldCom with two percent of the market. To measure many TRA members' market share would require fractional estimates into the hundreds or thousands of a percent.

[4] Dr. Hunt stresses that "[t]he combination of the two de facto monopolies will increase the strength of an already strong Ameritech Illinois and will enable Ameritech Illinois to retain customers that would otherwise migrate to competitive carriers." A result which has not been challenged by SBC or Ameritech. Direct Testimony on Reopening of Dr. Carl E. Hunt (for Illinois Commerce Commission Staff), ICC Staff EX.

competitors. TRA defers to these entities to brief the specific competitive implications of SBC's and Ameritech's proposed merger on these parties' individual companies. It is TRA's intent to underscore the necessity for realistic safeguards and stringent self-effectuating penalties that will hold SBC and Ameritech to their commitments, if a merger is ultimately approved.

II. SBC'S AND AMERITECH'S OPEN-ENDED MERGER PROMISES IN NO WAY ALLAY THE WELL-FOUNDED FEARS THAT THE MERGED ENTITY WILL ENGAGE IN ANTI-COMPETITIVE BEHAVIOR IN THE ABSENCE OF STRONG COMPETITIVE SAFEGUARDS.

In his direct testimony, Staff witness Hunt reiterates the Commission's Section 7-204(b)(6) obligations with respect to the proposed merger to "find that … the proposed reorganization is not likely to have significant adverse affect on competition in those markets over which the Commission has jurisdiction."[5] In carrying forth its obligation to ensure that the proposed merger will not adversely affect competition, the Commission should consider the proposed merger's impact not only on larger, well-established new CLECs, but on smaller, emerging companies as well.

Although the future of long-standing, highly capitalized CLECs may be relatively assured, regardless of their experiences in local markets, the future of smaller entities who will fuel local market competition is anything but guaranteed. This is not to suggest that TRA believes that the future of any entity should, or can, be guaranteed by the Commission in an effectively competitive market. Rather, it is TRA's contention that because emerging CLECs operate in a local market environment dominated by a former monopolist, now on the verge of perpetuating market

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9.01 (July 6, 1999) ["Hunt Direct"] lines 67 – 74.
[5] Hunt Direct, lines 54 – 57, citing to 220 ILCS 5/7-204(b)(6).

dominance through the synergies, cost savings, and enhanced resources of a merged entity, the Commission's role in preventing anti-competitive behavior becomes even more crucial.[6]

Dr. Hunt points to three "significant, adverse effects on competition that will result from the proposed merger": 1) increased retention of Ameritech Illinois customers, market share and power;[7] 2) exacerbation of the market's existing barriers sufficient "to prevent meaningful entry into the local exchange market,"[8] and; 3) the elimination of an actual potential competitor from the local market.[9] SBC's and Ameritech's promises of supporting competition to counter these concerns remain vague, unsubstantiated, and full of exceptions and limitations, rendering many of these dubious commitments ostensibly meaningless.

Government and Consumer Intervenors witness Selwyn, for example, cites the outcome of SBC's/Ameritech's National-Local Strategy ("NLS") as indicative of one of the anti-competitive manifestations of the proposed merger.[10] Drawing on Ameritech's own evidence, Dr. Selwyn concludes, "that the Ameritech acquisition is *necessary* in order to provide a core revenue base for the National-Local Strategy. In the case of Illinois, that core revenue base will come from the extensive noncompetitive services that Ameritech Illinois will continue to provide and dominate within its

[6] "[T]he appropriate market is the local exchange market in Ameritech Illinois' serving territory. In that market, Ameritech Illinois controls in excess of 95 percent of the market or, if resale is excluded, over 98 percent of the market." Hunt Direct, lines 285 – 288, citing to Commission Staff Ex 4.00 at 16-17.
[7] *Id*. lines 64, 65.
[8] *Id*. lines 88, 89.
[9] *Id*. lines 111, 112.
[10] Direct Testimony of on Rehearing of Lee L. Selwyn (Government and Consumer Intervenors Citizens Utility Board, Cook County State's Attorney, Attorney General of the State of Illinois)(July 6, 1999) ["Selwyn Direct"] at 26, *et seq*.

operating areas [emphasis in original]."[11] Mr. Gillan addresses with great detail the underlying fundamental concern that SBC's/Ameritech's NLS subsidiary will receive preferential treatment over competitors.[12]

Dr. Hunt too finds, "the proposed merger is designed to keep the market closed by retaining Ameritech Illinois' customers, market share and market power."[13] Mr. Gillan correctly concludes that the companies' commitments offer little insight into *how* the new entity will avoid engagement of anti-competitive behavior.[14] He notes, "[n]either [interconnection] commitment, however, amounts to more than agreement to do what SBC agrees to do, and neither promises to significantly reduce the time, cost or litigation that would otherwise apply using the arbitration process as it currently exists."[15] SBC's/Ameritech's commitments are in fact meaningless, as Mr. Gillan finds, because 1) they involve provisions SBC has voluntarily agreed to in other states; and 2) SBC proposes interpretive limitations subject to "substantive definition."[16] SBC/Ameritech ostensibly ask the Commission to find that the companies' commitments to follow SBC's existing undefined, untested, agreements somehow legitimize Ameritech's commitment not to engage in anti-competitive behavior. Staff

[11] Selwyn Direct at 28. The market potential for SBC is impressive. According to Staff witness Graves citing to transcript at 557-58, approximately 40% of Fortune 500 companies will be headquartered in one of SBC's incumbent states. These companies will have 130,000 offices throughout the U.S. who can best be served under a NLS. Direct Testimony of Reopening of Christopher Graves (Telecommunications Division Illinois Commerce Commission) ICC Staff Ex. 4.02 (July 6, 1999) ["Graves Direct"] at 26.
[12] Gillan Direct at 8, 9 *et seq*.
[13] Hunt Direct, lines 489 – 491.
[14] "With respect to NatLoCo [NLS], the Joint Applicants' testimony basically *confirms* its intention to leverage Ameritech-Illinois' incumbent monopoly to advantage NatLoCo, with little discussion as to how the partnership *actually* would work [emphasis in original]." Gillan Direct at 9.
[15] *Id*. at 10. TRA notes that SBC's "commitments" to competitors has yet to be found in compliance with Section 271 of the Telecommunications Act of 1996. While the Texas Public Utility Commission, for example, is inclined to give SBC's Section 271 application a favorable recommendation, it will not do so until actual performance data is collected for a period of no less than three months, *e.g.* until the Texas Commission *tests* SBC's compliance with its commitments.

witness Graves' conclusions are consistent with Mr. Gillan's, "…SBC's commitment [D] contains exceptions which are too expansive and which eliminate a large part of the commitment's benefits."[17] The Commission has no better yardstick for predicting SBC's and Ameritech's future behavior, than to scrutinize their past and current actions.

III. AMERITECH'S DISMAL HISTORIC TREATMENT OF COMPETITIVE LOCAL EXCHANGE CARRIERS SHOWS NO SIGN OF IMPROVEMENT AS A RESULT OF THE PROPOSED MERGER.

The long-term threat to competition is manifest in the current and past experiences of Illinois' emerging CLECs. As Global Com Inc. ("Global Com") witness Shave testified, Ameritech's and SBC's "commitments" to accommodate competition ring hollow in light of the long standing history of substandard treatment competitive local exchange carriers ("CLECs") such as Global Com Inc. have received from Ameritech since entering the local market.[18] Mr. Shave highlights Global Com's continual frustrations with Ameritech's Electronic Billing System, contract termination policies, diminished customer service record capabilities, negligible account management support, complex rating, and inconsistent procedures, among others, have impeded Global Com's ability to serve end users. McLeod witness Conn in part mirrors these concerns, recounting the "constant struggle" with Ameritech to implement interconnection agreement provisions for a two-year period since the agreement was signed.[19] Ms. Smoot of 21st Century Telecom of Illinois' too raises a

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16 Gillan Direct at 11, 12.
17 Graves Direct at 19.
18 Direct Testimony of John T. Shave (Global Com Inc.) ["Shave Direct"] at 3.
19 Direct Testimony of David R. Conn (McLeod USA Exhibit No. 1) at 8.

myriad of serious Ameritech faults, "reflective of a culture of indifference, if not active hostility, toward the development of local exchange service."[20] Global Com's experience, and that of other CLECs is not unique among other TRA members.

The problems highlighted by CLECs are the current manifestations of Ameritech's historic measured support of competition. The now defunct investigation into Ameritech's in-region interLATA market entry contained a preponderance of evidence demonstrating Ameritech's recalcitrance to fulfill its obligations to competitors pursuant to Sections 251, 252, and 271 of the Telecommunications Act of 1996.[21] As the CLECs' testimony and evidence now demonstrates, seemingly little has changed in the nearly three years since the Commission's Section 271 investigation was first initiated.

No broad commitments, in and of themselves, are sufficient to protect competition against a legacy of protectionist monopolistic behavior which frustrates competition at every turn. No Ameritech CLEC can yet claim to have made significant

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[20] Direct Testimony on Re-Opening of Kristen M. Smoot (21st Century Telecom of Illinois) ["Smoot Direct"] at 4. Nowhere are SBC's and Ameritech's ceaseless efforts to impede local competition at every turn more evident than in the companies' xDSL service policies. Staff witness Marshall reflects upon the companies commitment to offer xDSL services throughout Illinois in a non-discriminatory manner (Marshall Direct at 24.) Yet the commitment does not extend to making xDSL services available to competitors on a resold basis or otherwise. Ameritech and other regional Bell operating companies ("RBOCs") have vigorously pursued state and federal legislators and regulators for authority to deploy advanced xDSL and other services through separate affiliates which are not subject to the Act's resale, network unbundling, and interconnection obligations pursuant to Sections 251 and 252. SBC has succeeded in its home state of Texas this year with the enactment of SB560 which gives SBC sweeping power to bypass many of its federal statutory obligations through the reliance on affiliates to serve subscribers. The companies' merger conditions contemplate the rollout of advanced services through a separate affiliate, but are silent as to the availability of xDSL services or facilities to competitors. Congress intended that the RBOCs open their ubiquitous networks to competition as a prerequisite for in-region interLATA market entry, recognizing that such obligations were imperative for the development of local competition. SBC's and Ameritech's continued efforts to deprive competitors from access to advanced services exemplifies their measured, calculated "commitments" to support competition and should give rise to questions concerning the companies' sincerity. *See i.e.* Rebuttal Testimony on Reopening of Joan Campion (MCIWorldcom Ex. 4.0)(July 6, 1999) at 19.

[21] *Illinois Commerce Commission On its Own Motion Investigation concerning Illinois Bell Telephone*

competitive inroads, much less claim to have “made it’ in any Ameritech local market. Even the much-touted USN Communications, once viewed by many as a shining example of an Ameritech CLEC, has fallen by the wayside.

It is the CLECs’ end users who pay the ultimate price for Ameritech’s marginal support of CLECs. While the proposed SBC/Ameritech merger is purported to benefit the public, the Commission should not lose sight of the fact that the “public” also includes those end users who subscribe to CLEC services, as well as the CLECs themselves. Vague SBC/Ameritech promises cannot be unilaterally relied upon in light of the significant evidence demonstrating only a cursory support of competitors. Should the proposed merger be approved, all Illinois telecommunications users must realize a benefit, not just the incumbents’ existing customer base.

IV. APPROVAL OF THE PROPOSED MERGER MUST BE PREDICATED ON THE ADOPTION OF STRINGENT, SELF-EFFECTUATING PENALTIES.

SBC and Ameritech have relied heavily on broad post-merger “commitments” to encourage Commission approval of the proposed merger. Virtually all intervenors, with the exception of SBC/Ameritech, have demonstrated that the companies’ commitments are often undefined, limited, open to interpretation, and may be subject of protracted litigation in which few CLECs could likely engage. Attachment 1.2.1 to Mr. Gillan’s Direct Testimony, for example, documents numerous “limitations/exceptions” to SBC’s and Ameritech’s “commitments.”[22] Covad witness Deanhardt, discussing SBC’s and Ameritech’s *Interconnection Commitment A*, stresses that “SBC-Ameritech will only offer terms and conditions of interconnection and access

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Company’s compliance with Section 271(c) of the Telecommunications Act of 1996, 96-0404.

that SBC 'voluntarily' agrees to provide CLECs in other states."[23] Mr. Deanhardt concludes, "[o]ur experience tells us that SBC-Ameritech's proposal would only encourage SBC and Ameritech to arbitrate every questionable issue in all other states – because in doing so, they would minimize the number of "voluntary" commitments they would have to make available in Illinois."[24] SBC's and Ameritech's commitments can hardly be relied upon as competitive safeguards unless stringent, self-effectuating penalties are contemporaneously adopted.

If the companies are serious about their commitments to the Commission and citizens of Illinois, they should freely accept to bear full financial responsibility for their inability -- or unwillingness -- to meet those commitments. TRA continues to believe that the merger should be predicated on meeting pre-merger commitments. In the absence of such pre-merger conditions, however, the need for strict safeguards and enforcement of proposed merger commitments becomes far more crucial, given SBC's/Ameritech's history, and the broad, prospective nature of their promises and commitments. As the record now stands, the companies' commitments can only be proven *after* the merger.[25] Should the entities be merged, there will be no turning back. Without stringent, self-effectuating penalties and enforcement, SBC's and Ameritech's promises may become as empty commitments as the proverbial "check is

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[22] Gillan Direct, Attachment 1.2.1.
[23] Direct Testimony on Reopening of Clay Deanhardt (Covad Communications Company)(July 6, 1999) ["Deanhardt Direct"], at 5.
[24] Deanhardt Direct at 6. Also see Gillan Direct at 11.
[25] "Further, the proposed conditions implicitly are made contingent upon approval of the merger and will not be implemented before the merger." "Because Joint Applicants are not proposing to satisfy the conditions before the merger is consummated, there are significant questions in my mind whether they will ever be implemented. In addition, SBC/Ameritech has already put the Commission and the parties on notice that these conditions may be withdrawn if there are changes in policies such as those embodied in the current FCC UNE rules." Rebuttal Testimony of W. Richard Morris (Sprint Communications Company, L.P., Ex.

in the mail" once the companies achieve their merger goal.[26]

TRA is encouraged by SBC's and Ameritech's commitment to meet the performance measures adopted in the Texas Section 271 proceeding.[27] According to Sprint witness Smith, "Performance measurements are necessary to ensure that Ameritech-Illinois service is provided at levels of parity to CLECs. Without parity, CLECs cannot compete with Ameritech-Illinois on an equal footing in the provision of quality service to their customers."[28] Yet the absence of substantive penalties for substandard performance fuels concerns over the practical value of SBC's and Ameritech's commitments. Additionally, unlike the Texas proceeding, where failure to meet performance measures may adversely affect Southwestern Bell Telephone Company's bid for interLATA market entry, the SBC/Ameritech proposed merger may be approved *before* evidence of meeting Texas-like performance measures is ever demonstrated.

Staff witness Marshall expresses her belief "that specific and separate economic penalties should be applied to each condition that is not met by the applicants."[29] TRA agrees. Such economic penalties are critical because of their direct impact on the companies' willingness to live up to their commitments and treat competitors equitably. Non-performance penalties must create a sufficient incentive for SBC and Ameritech to make good on their commitments. To be effective, non-

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4.0)(July 6, 1999) at 4, 5.

[26] Dr. Selwyn, for example, recounts several instances where SBC, Ameritech, and their subsidiaries have failed to meet expressed commitments to regulators. Selwyn Direct, pp. 32 –36.

[27] Commitment reiterated in Rebuttal Testimony on Reopening of William R. Dysart (SBC-Ameritech, Exhibit 10.1)(July 12, 1999) at 2.

[28] Rebuttal Testimony of Mark T. Smith (Sprint Communications Company, L.P., Ex. 5.0)(July 6, 1999) at 4.

[29] Marshall Direct at 16.

performance penalties should be both compensatory and punitive. Competitors that become the victims of non-performance by the companies will be severely harmed. Their customers can not be expected to accept delays in establishment of service, cutoffs, misdirected calls or any other type of inadequate service caused by the companies. Competitors may therefore lose customers due to the companies' nonperformance. Thus, payments under incident based liquidated damages provisions should be severe enough to discourage nonperformance. They could be viewed as containing elements of both compensatory and punitive damages. Additionally, because the public is ultimately harmed by such actions, consideration should be given to providing a portion of damages to customers. Such payment would be particularly appropriate where the companies fail to meet their annual performance targets. TRA suggests that a portion of such payments shall be made to carriers based on a pro rata allocation, such as numbers of lines or minutes of usage, and a portion shall be paid to customers.

Marginal or capped penalties do not achieve the objective of discouraging nonperformance. In his testimony, Dr. Selwyn's reflects on the efficacy of a capped financial penalty such as is contemplated in the recently proposed FCC Staff SBC/Ameritech merger conditions. He notes that the proposed $2 billion cap, "is a small fraction (slightly over 10%) of the gross $18.3-billion in merger gains…" which "must be evaluated against the economic benefit to the post-merger SBC of its non-compliance."[30] Caps, such as those proposed by the FCC staff, may dilute the benefit of imposing penalties by leading to a cost/benefit analysis as occurred when

Ameritech Illinois deliberately elected not to comply with Commission service quality requirements because penalty costs were far more cost effective than improving service quality.[31]

Penalties must be self-effectuating. Few CLECs, and even fewer smaller CLECs, will be able to withstand protracted litigation to demonstrate that SBC/Ameritech failed to meet its obligations if self-effectuating penalties are not implemented. The need for self-effectuating penalties is acute given the numerous limitations and exceptions that the companies have placed on their commitments. Otherwise, the adoption of financial penalties will have negligible value if mountains will have to be moved before any penalty can be imposed.

The companies' unwillingness to accept financial responsibility for their actions serves as an effective gauge of the sincerity of their commitments. According to Mr. Gillan, the companies "have fundamentally agreed only to 'talk about it [penalties]' in future collaborative workshops and hearings.[32] Only recently have the companies been willing to commit to any financial penalties. Their reluctance to consider liquidated damages for non-performance raises serious questions as to the substance behind their commitments and underscores the need for enforcement and penalties.

V. CONCLUSION.

Despite the volume of testimony and evidence submitted by SBC and Ameritech, the fact remains that many of the companies' post-condition commitments

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[30] Selwyn Direct at 37.
[31] Selwyn Direct at 37.
[32] Gillan Direct at 38.

remain vague and riddled with limitations and exceptions. The evidence presented in the instant proceeding demonstrates the weak foundation on which SBC's and Ameritech's promises are placed. Under the proposed post-merger conditions advocated by SBC and Ameritech, the companies retain every potential to leverage expanded resources to engage in the very anti-competitive behavior feared by competitors. SBC's and Ameritech's historic and current efforts to impede competition at every turn bear out competitors' fears.

Establishment of *pre-merger* conditions remains the most effective means for evaluating the proposed merger. Nevertheless, adoption of performance measures patterned after those in Texas, as well as independent operations support system testing, and other SBC and Ameritech post merger commitments may mitigate the potential for anti-competitive behavior. Their adoption will, however, be incomplete without the added imposition of meaningful self-effectuating punitive penalties for non-performance.

It is now up to the Commission to ensure that a merger meant to "promote competition" does not kill it. TRA urges the Commission to be guided by the overwhelming evidence in this proceeding that points to the need for either rejection of the proposed merger or the imposition of specific and enforceable, long-term merger conditions that go far beyond those proposed by the companies.

Respectfully submitted,

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